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IN THE

Supreme Court of the United States

October Term 1960

No. 515

WORKMEN'S COMPENSATION PROCEEDINGS

In the Matter
of the Claim of
THOMAS MLODOZENIEC,

Appellee,

against -

WORTHINGTON CORPORATION, Self-Insured Employer,

Appellant,

and

SPECIAL DISABILITY FUND UNDER SECTION 15-8, WORKMEN'S COMPENSATION BOARD,

Appellees.

JURISDICTIONAL STATEMENT

On Appeal from the Court of Appeals of New York

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BATAVIA TIMES LAW PRINTERS,
BATAVIA, N. Y.

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SPECIAL DISABILITY FUND UNDER SECTION 15-8, WORKMEN'S COMPENSATION BOARD,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant, Worthington Corporation, has appealed from the judgment of the Court of Appeals of New York made

on the 10th day of June 1960 in this proceeding under the Workmen's Compensation Law of New York, and submits the following jurisdictional statement:

Opinions Below

The Court of Appeals affirmed without opinion the order of the Supreme Court, Appellate Division, Third Department. The opinion of the said Appellate Division is reported at 1 A. D. 2d 21. A copy of said opinion is set out in full in the record below filed herewith (pp. 57-61).

Grounds Upon Which Jurisdiction is Invoked

The judgment of the Court of Appeals which is sought to be reviewed was made and entered on June 10, 1960 (Rec. pp. 63-66). A motion for reargument was duly made and an order denying motion for reargument was made and entered on July 8, 1960 (Rec. p. 68). The notice of appeal was filed in the Supreme Court, Appellate Division, Third Department, on September 21, 1960 (Rec. pp. 66-67).

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2) since the validity of a state statute on grounds of repugnancy to the Fourteenth Amendment of the Constitution is drawn in question.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Pink v. Dept. of Banking, 317 U. S. 264;
Charleston Federal Savings and Loan Association v. Alderson, 324 U. S. 182;
Prudential Insurance Co. v. Cheek, 259 U. S. 530;
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282.

The Statute

The statute, the validity of which is involved, is Chapter 938 of the Laws of 1957. The Chapter amended section 44-a of the Workmen's Compensation Law (Chapter 67 of the Consolidated Laws). Section 44-a, with the new matter in italics, is as follows:

> "§ 44a. **Liability of employer; silicosis or other dust diseases.**—The employer in whose employment an employee was last exposed to an injurious dust hazard shall be liable for the payments required by this chapter when disability or death of the employee shall be due to silicosis or other dust disease. Notwithstanding the provisions of section forty of this chapter the employer shall be liable for the payments prescribed by this chapter when such disability results within two years after the last injurious exposure as defined in section forty-seven; *or where the employee while continuously employed by the same employer is transferred from an injurious exposure to a non-injurious exposure and disablement occurs at any time during such employment with the same employer, or within two years after termination of such employment*; or when death results at any time from such injurious exposure."

Section 2 of Chapter 938, Laws of 1957 states: "This act shall take effect July first, nineteen hundred and fifty-seven."

The pertinent text of other sections of the Workmen's Compensation Law are set forth in Appendix B hereto.

Questions Presented

The amendment to section 44-a (*supra*) has been construed to be retroactive so as to apply to cases "open and pending" on July 1, 1957, the effective date of the amendment. The instant case was "open and pending" on July 1, 1957, only because the Workmen's Compensation Board

had allowed a claim, now conceded to have been invalid, and the employer had appealed to the Courts. This has raised serious substantive and procedural constitutional questions:

1. Is the said amendment to section 44-a of the Workmen's Compensation Law repugnant to the Fourteenth Amendment and therefore null and void?

2. Is the appellant deprived of its property without due process of law by the amendment to section 44-a of the Workmen's Compensation Law which creates a new liability for silicosis in cases which were previously non-compensable because disablement did not occur within two years from the last exposure?

3. Is the appellant denied the equal protection of the laws under the Fourteenth Amendment of the Constitution by the creation of this liability in a case which, except for the previous filing of an invalid claim, would have been outlawed by the applicable statute of limitations had the claim been filed on the very day the amendment took effect?

4. Is the classification of this case as "open and pending" for the purpose of applying the amendment to § 44-a a proper classification based upon a pertinent and real difference?

Statement

The appeals in the courts below were heard upon a shortened record which contained only such matter as was essential to a determination. The case involves a claim under the Workmen's Compensation Law of Thomas Mlodozeniec, now deceased (see order of substitution, Rec. p. 74), for total disability due to silicosis which began on

August 1, 1953. The case was heard by a referee of the Workmen's Compensation Board, and on May 25, 1955 he made a decision disallowing the claim upon the ground that since the last exposure to silica dust had occurred on July 1, 1946 and the disablement had occurred on August 1, 1953, that more than two years had elapsed between the last injurious exposure and the date of disablement, and that, therefore, there was no liability under section 44-a of the Workmen's Compensation Law (fol. 82).

The claimant applied to the Workmen's Compensation Board for review of this decision citing a previous decision of the Workmen's Compensation Board in which an award had been made in an identical case based upon the board's interpretation of section 40 of the Workmen's Compensation Law (Appendix B). The case cited was *Matter of Gajewski v. American Radiator & Std. Sanitary Corp.* which had been decided by the board on November 16, 1954 (fol. 133).

The board, following its own decision in *Matter of Gajewski*, reversed the referee decision herein on December 14, 1955, and remanded the case for consideration of other issues (fol. 94). From this decision appellant appealed (fol. 24).

A week later, on December 23, 1955, the board's decision in *Matter of Gajewski*, which had been appealed, was reversed by the Supreme Court, Appellate Division, upon the ground "that in dust diseases the two-year period between exposure and disability is controlling and cannot be extended by general resort to the provisions of section 40" (*Matter of Gajewski v. American Radiator & Std. Sanitary Corp.*, 1 A. D. 2d 81; § 40, Workmen's Compensation Law, Appendix B).

Upon the remand of the instant case the referee, of course, made an award to the claimant (fol. 102). The appellant applied for review fortified with the Court decision in *Matter of Gajewski (supra*, 1 A. D. 2d 81).

There can be no question that following the Court decision in *Matter of Gajewski* the board had no alternative but to follow that decision. It chose to ignore it (fol. 112). The appellant again appealed (fol. 42).

No appeal could be perfected, however, until the board, pursuant to the law in effect at that time, handed down its formal findings of fact and rulings of law (section 23, Workmen's Compensation Law, Appendix B [amended to abolish formal findings by Chapter 974, Laws of 1958, eff. Sept. 1, 1958]).

In the meantime, there had been a movement to amend section 44-a which barred a recovery in this case. The matter had been under consideration by the Joint Legislative Committee on Industrial and Labor Conditions, and following an agreement between labor and industry representatives during the summer of 1956 an amendment, sponsored by the Joint Legislative Committee, was introduced and passed in the 1957 legislative session (N. Y. Leg. Ann. 1957, p. 303). It is the validity of this amendment which is challenged by this appeal. By its terms the amendment was to become effective September 1, 1957 (L. 1957, Ch. 938, § 2).

During all this time no "findings of fact and rulings of law" pursuant to section 23 of the Workmen's Compensation Law had been forthcoming from the Workmen's Compensation Board.

Instead, on June 6, 1958, despite the pending appeals, the board handed down a "Supplemental Memorandum of De-

cision" in which it held, by a divided panel, that "Section 44-a as amended by Chapter 938, Laws of 1957, effective July 1, 1957, should apply to all cases open and pending on the effective date of such amendment" (fol. 124).

The appellant now filed another notice of appeal, its fifth (fol. 48).

At long last, on September 22, 1958, the Workmen's Compensation Board handed down its Findings of Fact and Rulings of Law (fols. 62 *et seq.*). The appellant was now able to proceed with its appeal. It did so with all possible speed.

The Appellate Division affirmed the decision holding that in their view "the amendment is remedial and retrospective" (Opinion, fol. 169 *et seq.*). The Court of Appeals affirmed without opinion (Remittitur, June 10, 1960, Rec. pp. 63-66).

In its order amending the remittitur the Court of Appeals stated:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, *viz:* Appellant contends that its rights to due process of the laws under the Fourteenth Amendment of the Constitution were denied. The Court of Appeals held that there was no such deprivation or denial". (Rec. p. 69).

In sustaining the validity of Laws of 1957, Chapter 938, in its retroactive application this case is brought within the scope of 28 U. S. C., Section 1257(2).

The Questions Are Substantial

There is doubtless broad constitutional power in the State Legislature to fix or alter benefits under the Workmen's Compensation Law. For many years New York

Courts consistently held that statutes increasing the nature and extent of benefits were prospective in their application and would apply only to injuries sustained after their enactment (*Matter of Blatchley*, 225 App. Div. 167 [1929]; *Balderson v. Wallace & Co.*, 212 App. Div. 189 [1925]; cf. *Matter of Hampton Roads Stevedoring Corp. v. O'Hearne* [184 F. 2d 76]).

In 1945 in *Schmidt v. Wolf Contracting Co.* (269 App. Div. 201, Affd. without op., 295 N. Y. 748 [1946]) an amendment increasing for the term of one year the maximum disability payment from $25.00 to $28.00 per week was held to be "emergency" legislation and therefore retroactive and constitutional.

There followed a series of cases, cited in the opinion of the Appellate Division below (fols. 180-182), involving time limitations for filing claims, increases in the rate or amount of benefits, or dealing with rights respecting recoveries in third party actions, which had the effect of augmenting or accelerating compensation benefits. Retroactivity in those cases was held justified upon the ground that the amendments were *procedural* (*Matter of Wood v. Queen City Neon Sign Co.*, 282 App. Div. 106 [May 1953]; *Matter of Martino v. Mountain Valley Water Co.*, 270 App. Div. 968; *Matter of Metzger v. Metzger Press*, 301 N. Y. 781; *Matter of McCarthy v. H. J. Heinz Co.*, 2 N. D. 908).

The present case is a clear departure from the previous cases, and, whether or not the gradual attenuation of constitutional limitations in previous cases was permissible, the present case so far exceeds the legislative power as to be in direct conflict with the Fourteenth Amendment.

It is settled law in New York State that "[t]o supply a remedy where previously there was none of any kind, is to

create a cause of action" (*Jacobus v. Colgate*, 217 N. Y. 235, 240). In no circumstances can the amendment in question be deemed procedural. Nor can it be considered to do anything in this case, when applied retrospectively, than to create a new right, a new "cause of action", where none existed before.

This distinction, of course, places the case beyond the scope of decisions which deal with statutes of limitation in respect to which there is broad discretion (*Chase Securities Corp. v. Donaldson*, 325 U. S. 312; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540). But even if we consider this enactment a statute of limitations—of a sort, its invalidity is clear. It is well settled that the legislature may constitutionally shorten the statutory period within which a claim may be asserted. But a statutory amendment which shortens a limitation to a period which has already lapsed and "containing no provision for saving existing rights or giving to them or to others in like situation any opportunity to assert their rights,—it was the same in effect as taking their property without due process of law" (*Ochoa v. Hernandes y Morales*, 230 U. S. 139 [1913]).

Any claimant, identically situated, and who did not file an *invalid* claim prior to the effective date of the amendment would find his "claim" outlawed though he filed his notice of claim on the very day the amendment took effect (assuming, of course, that his disablement had occurred more than two years prior to July 1, 1957). This is so because under section 28 of the Workmen's Compensation Law a claim must be filed within two years from the date of disablement (§ 28, Workmen's Compensation Law, Appendix B).

Only such claimants similarly situated who had had the prescience to file *invalid* claims before § 28 had run against

them would have had their claims validated by the new amendment on July 1, 1957.

The statute of limitations could thus be effectively tolled by the simple expedient of filing [baseless] claims though there should have been no reasonable hope of recovery (cf *Stewart v. Keyes*, 295 U. S. 403). Many interesting possibilities suggest themselves in the light of the principle of continuing jurisdiction of the board.

On the other hand, had the board made timely, *correct* decisions by disallowing such claims under existing law they would be unaffected by the amendment because they would not have been "open and pending" on July 1, 1957.

Let us assume the situation in which the board made identical *erroneous* decisions under the then existing law in both *Gajewski v. American Radiator & Std. Sanitary Corp.* (1 A. D. 2d 81; Affd. 2 N. Y. 2d 1007) and in the instant case, as indeed it did; that the employers in each case appealed, as they did; that the present case was argued first in the Appellate Division. In that situation *Gajewski* would have recovered because his case had remained "open and pending" while *Mlodozeniec* would have been disallowed on the appeal. Thus, the right to recover would depend upon which claimant had had the misfortune to have had his appeal determined first!

This situation is similar to one which was proscribed by the Court of Appeals in *Matter of Vleck v. Perry*, 270 N. Y. 371. There the Court said:

> "To hold otherwise is to create inequality in liability of carriers and employers depending not on the date of injury or death of the injured employee, but upon a variable factor, the time during which an appeal may be before the courts."

Considered from the point of view of the employer, is he not being singled out by the merest coincidence for a liability which is not to be imposed upon others in like circumstances? It seems clear that the discrimination is an invidious one (*Queenside Hills Realty Co. v. Saxl*, 328 U. S. 80). "The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rules under similar circumstances" (*Louisville Gas & Electric Co. v. Coleman*, 227 U. S. 32, 37).

In *Morey v. Doud* (354 U. S. 457) this Court quoted the rules for testing a discrimination as summarized in *Lindsley v. National Carbonic Gas Co.* (220 U. S. 61, 78-79). "To these rules," the Court said, "we add the caution that discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

The appellant was entitled to a dismissal of this claim long before the amendment to § 44-a was enacted, let alone became effective. The refusal of the board to heed and apply the decisions of higher authority raises grave questions of fairness and impartiality and more than suggests that the law here may have been administered with such an "unequal hand" as to make an unjust and illegal discrimination between persons in similar circumstances. To have denied to the employer the means of perfecting its appeal so that the "case" remained "open and pending" and then to make a classification of cases open and pending for the purpose of applying the amendment retroactively is so extraordinary as to be, *per se*, such a denial of due process and of the equal protection of the laws as to require the most careful consideration of this Court (*Frost v. Corporation Comm. of Okla.*, 278 U. S. 515; *Col-*

gate v. Harvey, 297 U. S. 404; *Stewart v. Keyes*, 295 U. S. 403; *Queenside Hills Realty Co. v. Saxl*, 328 U. S. 80).

Appended hereto and marked "Appendix A" is a copy of the judgment of the Court of Appeals from which this appeal is taken.

Other cases are pending the determination of which will depend on the final disposition of this case. The principles involved herein, therefore, transcend the immediate interests of the parties hereto. It is submitted that Chapter 938 of the Laws of 1957 as construed and applied herein is repugnant to the Fourteenth Amendment of the Constitution of the United States and, therefore, null and void; that the questions presented are substantial enough to require plenary consideration by this Court.

Wherefore, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1257(2), Title 28, United States Code.

Respectfully submitted,

BENEDICT T. MANGANO,
Attorney for Appellant,
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Albany 7, New York.

Appendix "A"

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 10th day of June in the year of our Lord one thousand nine hundred and sixty, before the Judges of said Court.

WITNESS,

The Hon. Charles S. Desmond,

Chief Judge, Presiding.

Raymond J. Cannon,

Clerk.

REMITTITUR June 10, 1960.

No. 152.

In the Matter
of the Claim for
COMPENSATION &c., made by THOMAS MLODOZENIEC,

Claimant-Respondent,

vs.

WORTHINGTON CORPORATION, Self Insured Employer,

Appellant,

and

SPECIAL DISABILITY FUND UNDER SEC. 15-8, and WORKMEN'S COMPENSATION BOARD,

Respondents.

Be it Remembered, That on the 20th day of April in the year of our Lord one thousand nine hundred and sixty,

Appendix "A"

Worthington Corporation, Self-Insured Employer, the appellant in this cause, came here unto the Court of Appeals by Benedict T. Mangano, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Thomas Mlodozeniec, the claimant-respondent, and Special Disability Fund Under Sec. 15-8, and Workmen's Compensation Board, the respondents in said cause, afterwards appeared in said Court of Appeals by Tiernan & Borowiec, John M. Cullen, and Louis J. Lefkowitz, Attorney General, their respective attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Benedict T. Mangano, of counsel for the appellant, and by Mr. Gilbert M. Landy, of counsel for the respondent Board, no appearance for the remaining respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs to the Workmen's Compensation Board.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs &c., as aforesaid.

Appendix "A"

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

/s/ RAYMOND J. CANNON,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, June 10, 1960.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON,
(Seal) *Clerk.*

Appendix "B"

PERTINENT SECTIONS OF THE WORKMEN'S COMPENSATION LAW

The pertinent text (since repealed) of § 23 of the Workmen's Compensation Law with respect to findings is as follows:

> "§ 23. Appeal. * * *. If notice of such appeal is served upon the board, the board shall within sixty days thereafter serve upon the parties in interest and file its findings of fact and rulings of law in such case. * * *"

The pertinent text of § 28 of the Workmen's Compensation Law is as follows:

> "§ 28. Limitation of right to compensation. The right to claim compensation under this chapter shall be barred, except as hereinafter provided, unless within two years after the accident, or if death results therefrom within two years after such death, a claim for compensation shall be filed with the chairman, but the employer and insurance carrier shall be deemed to have waived the bar of the statute unless the objection to the failure to file the claim within two years is raised on the first hearing on such claim at which all parties in interest are present. * * *"

> "§ 38. *Disablement treated as accident.* The disablement of an employee resulting from an occupational disease described in subdivision two of section three shall be treated as the happening of an accident within the meaning of this chapter and the procedure and practice provided in this chapter shall apply to all proceedings under this article, except where specially otherwise provided herein."

The pertinent text of § 40 of the Workmen's Compensation Law is as follows:

> "§ 40. *Time limit.* Neither the employee nor his dependents shall be entitled to compensation for disability or death resulting from disease unless the dis-

ease is due to the nature of his employment and contracted therein, or in a continuous employment similar to the one in which he was engaged at the time of his disablement, within the twelve months previous to the date of disablement, whether under one or more employers. The time limit for contraction of the disease prescribed by this section shall not bar compensation in the case of an employee who contracted the disease in the same employment with the same employer by whom he was employed at the time of his disablement and who had continued in the same employment with the same employer from the time of contracting the disease up to the time of his disablement thereby; * * *."

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Appellant,

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Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM ON BEHALF OF WORKMEN'S COMPENSATION BOARD

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IN THE

Supreme Court of the United States

No. 515—OCTOBER TERM, 1960

WORTHINGTON CORPORATION,

Appellant,

against

THOMAS MLODOZENIEC, SPECIAL DISABILITY FUND under Workmen's Compensation Law, Section 15, subdivision 8, and WORKMEN'S COMPENSATION BOARD,

Appellees.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM ON BEHALF OF WORKMEN'S COMPENSATION BOARD

Appellee, Workmen's Compensation Board, moves that the appeal herein be dismissed, or in the alternative that the order appealed from be affirmed.

Challenged Statute and Proceedings Below

Appellant challenges the constitutionality of the application of New York State Workmen's Compensation Law § 44-a, as amended by L. 1957, ch. 938, effective July 1, 1957, to a claim by Thomas Mlodozeniec, the claimant-appellee, for disability compensation for the period from August 1, 1953 to July 19, 1956, prior to the effective date of the amendment (Jurisdictional Statement, pp. 3, 4).

Prior to July 1, 1957, the provisions of Workmen's Compensation Law § 44-a read as follows:

"§ 44-a. *Liability of employer; silicosis or other dust diseases.* The employer in whose employment an employee was last exposed to an injurious dust hazard shall be liable for the payments required by this chapter when disability or death of the employee shall be due to silicosis or other dust diseases. Nothwithstanding the provisions of section forty of this chapter the employer shall be liable for the payments prescribed by this chapter when such disability results within two years after the last injurious exposure as defined in section forty-seven; or when death results at any time from such injurious exposure."

Section 44-a was amended by L. 1957, ch. 938, effective July 1, 1957. The amendment merely added, at the end of the section, a clause reading as follows:

"* * * *or where the employee while continuously employed by the same employer is transferred from an injurious exposure to a non-injurious exposure and disablement occurs at any time during such employment with the same employer, or within two years after termination of such employment;* or when death results at any time from such injurious exposure." (Italics indicate new matter)

Thomas Mlódozeniec was employed by the appellant as a chipper and grinder from September 22, 1930 to July 1, 1946. During all that time, he was exposed to silica dust in his employment. On the latter date, he was transferred to the employer's machine shop where he no longer came in contact with silica dust.

On August 1, 1953, Mlodozeniec became permanently totally disabled as a result of silico-tuberculosis due to the exposure to silica dust in his employment with the appellant. He accordingly filed a claim for compensation

with the New York Workmen's Compensation Board for the disability which he had sustained. On May 25, 1955, the Workmen's Compensation Board Referee disallowed the claim on the ground that Mlodozeniec's disability commenced on August 1, 1953, more than 2 years after July 1, 1946, the date of his last injurious exposure to silica dust (fols. 76-83).

On Mlodozeniec's application to review the determination of the Referee (fols. 130-134), the Panel of the Workmen's Compensation Board on December 14, 1955, reversed the decision of the Referee, and held that the continuity of the employment by Mlodozeniec with the same employer from the time of contracting the silico-tuberculosis until the date of disablement was sufficient to waive the time limitations of Workmen's Compensation Law, §§ 40 and 44-a (Appendix A). The Panel directed that the case be restored to the Referee's calendar for the development of the record on other issues (fols. 91-96).

On December 23, 1955, the New York Supreme Court, Appellate Division, Third Department, held in a case similar to the case herein (*Matter of Gajewski* v. *American Radiator & Standard Sanitary Corporation*, 1 A. D. 2d 81), that compensation is not payable to employees who became disabled more than 2 years after their last injurious exposure to silica dust, even though they continued to be employed by the same employer in non-injurious exposure jobs up to the date of the disability.

On August 6, 1956, between the date of the decision of the Appellate Division in the *Gajewski* case and the affirmance of the order of that Court by the New York Court of Appeals on April 12, 1957 (2 N. Y. 2d 1007), the Workmen's Compensation Board Referee made an award to Mlodozeniec for disability compensation covering the period from August 1, 1953 to July 19, 1956 (fols. 97-104).

Following the decision of the Courts in the *Gajewski* case, the New York Joint Legislative Committee on Industrial and Labor Conditions, in 1957, made a report to the

Legislature on the seriousness of the problem created by the decision (N. Y. Leg. Ann., 1957, p. 303; Appendix B). The report pointed out that until the decision of the New York Supreme Court, Appellate Division, Third Department, in the *Gajewski* case, it was believed generally that the exception contained in Workmen's Compensation Law, § 40 (Appendix A), which exempted employees who contracted the disease in the same employment with the same employer by whom he was employed at the time of his disablement and who had continued in the same employment with the same employer from the time of contracting the disease up to the time of his disablement, applied to workmen who contracted silicosis in their employments. In the report it was recommended by the Joint Legislative Committee that Workmen's Compensation Law, § 44-a, be amended by incorporating an exception similar to that contained in § 40. L. 1957, Ch. 938 carries out the recommendation contained in the report.

Meanwhile, the instant case still was pending and was on appeal to the Appellate Division, Third Department. On June 6, 1958, the Workmen's Compensation Board held that the 1957 amendment to § 44-a, applied to all cases open and pending on July 1, 1957, the effective date of the amendment (fols. 121-126).

On August 13, 1959, the New York Supreme Court, Appellate Division, Third Department, affirmed the decision of the Workmen's Compensation Board (9 A. D. 2d 21; fols. 169-183). The Court of Appeals affirmed the order of the Appellate Division without opinion (8 N. Y. 2d 918 [1960]).

A motion was made by the appellant in the Court of Appeals for reargument of the appeal or in the alternative for an amendment of the remittitur. The motion for reargument was denied (8 N. Y. 1011 [1960]). The motion for the amendment of the remittitur was granted (8 N. Y. 1012 [1960]). The remittitur was amended to state that

upon the appeal there was presented and necessarily passed upon a question under the Constitution of the United States; that the appellant contended that the right to due process of law and equal protection of the laws under the Fourteenth Amendment of the Constitution were denied and that the Court of Appeals held that there was no such deprivation or denial.

It is from the order of the New York Court of Appeals that the appellant appeals to this Court.

ARGUMENT

No substantial federal question is presented in the jurisdictional statement of the appellant.

The constitutional attack by the appellant is directed to the application of New York State Workmen's Compensation Law § 44-a. That statute imposes liability upon employers for disability resulting from silicosis in cases in which the workman's disability results within 2 years after the last injurious exposure to silica dust. However, it contains an exception to the 2 year requirement between exposure and disability. If the employee, while continuously employed by the same employer is transferred from an injurious exposure to a non-injurious exposure and disablement occurs at any time during such employment with the same employer, or within 2 years after termination of such employment, the employer is liable for the payments prescribed by the Workmen's Compensation Law.

The provisions of Workmen's Compensation Law § 44-a as they read prior to July 1, 1957, constitute a statute of limitations on the right of a workman who contracted silicosis in his employment with the employer. It can not be disputed that if the workman became disabled within the 2 year period specified in the statute, he could prosecute his claim for compensation.

The amendment to Workmen's Compensation Law § 44-a (L. 1957, ch. 938) which is the subject matter of this appeal, did not create a new right or a new cause of action where none existed before, as alleged by the appellant (Jurisdictional Statement, p. 9).

As pointed out in the decision of the New York Supreme Court, Appellate Division, Third Department, it long has been recognized by law that the contraction of silicosis in a workman's employment constituted a "wrong" (*Barrencotto* v. *Cocker Saw Company, Inc.*, 266 N. Y. 139 [1934]). Moreover, as early as 1935, silicosis became a compensable disease under the Workmen's Compensation Law by the addition of § 3, subd. 2, par. 28, to that law. That paragraph brought in "Any and all occupational diseases" within the coverage of the statute (*Matter of Kazia* v. *Woodcrest Construction Co., et al.*, 282 App. Div. 880 [3rd Dept., 1953]).

It is true that when silicosis became compensable in 1935, the right to claim compensation in silicosis cases was subject to the limitations contained in Workmen's Compensation Law § 40, that the disease must have been contracted within 12 months previous to the date of disablement. However, the limitation itself merely constituted a statute of limitations on the right of workmen to claim compensation for disablement due to silicosis.

In 1936 (L. 1936, ch. 887), silicosis was excluded from the general occupational disease coverage under Workmen's Compensation Law § 3, subd. 2, par. 28, and it was made the subject of a new article numbered Article 4-A. By L. 1947, ch. 431, silicosis again was brought within the general occupational disease coverage subject, however, to the 2 year limitation between last injurious exposure and disablement contained in § 44-a and to certain other limitations not applicable here.

The 2 year limitation contained in § 44-a merely was a statute of limitations which could be changed or even lifted entirely at any time by the New York State Legislature.

Moreover, the policy of New York State which specified that in silicosis cases disablement must occur within 2 years after the last injurious exposure to silica dust, did not give the appellant a constitutional right against a change in that policy during and before a final adjudication of the claim for compensation.

The amendment to § 44-a was similar to the Minnesota statute which lifted the bar of a statute of limitations in a case in which litigation was pending. This Court upheld the constitutionality of the statute under attack and held that it was not violative of the Fourteenth Amendment of the United States Constitution (*Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304 [1945]).

Furthermore, even assuming without admitting that the amendment to Workmen's Compensation Law § 44-a (L. 1957, ch. 938), created a new "cause of action" as alleged by appellant (Jurisdictional Statement, p. 9), it is not thereby rendered unconstitutional (*Jacobus* v. *Colgate*, 217 N. Y. 235, 242 [1916]; *Jackson* v. *State of New York*, 261 N. Y. 134, 139 [1933]).

It long has been an accepted principle that the Workmen's Compensation Law is a remedial statute which was enacted for the promotion of the public good (*Matter of Petrie*, 215 N. Y. 335 [1915]; *Matter of Schmidt* v. *Wolf Contracting Co., Inc.*, 269 App. Div. 201 [3rd Dept., 1945], aff'd 295 N. Y. 748 [1946]).

When, following the decision in *Matter of Gazewski* v. *American Radiator & Standard Sanitary Corporation*, *supra*, the New York State Legislature became cognizant of the imperfections in the Workmen's Compensation Law in relation to silicosis cases, it amended § 44-a thereof for the promotion of the public good.

It long has been firmly established that neither property rights nor contract rights are absolute. They both are subject to the police power of the State which may enact laws which are reasonably necessary to secure the general

welfare of the community. The police power may be exercised to effect the due process of law clause as well as other clauses of the Federal Constitution (*Nebbia* v. *New York*, 291 U. S. 502 [1934]; *Queenside Hills Security Co., Inc.* v. *Saxl*, 328 U. S. 80, 82, 83 [1946]; *Veix* v. *Sixth Ward Building & Loan Association*, 310 U. S. 32, 40 [1940]; *Atlantic Coast Line Railroad Company* v. *City of Goldsboro*, 232 U. S. 548, 558, 559 [1914]; *People ex rel. Durham Realty Corp.* v. *LaFetra*, 230 N. Y. 429 [1921]; *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398 [1934]).

Laws passed in the exercise of police powers which tend toward preservation of public safety or the lives, health and morals of our inhabitants and to the welfare of the community are constitutional and a law reasonably related and applied to a demonstrated evil, not arbitrary or discriminatory, satisfies the demands of due process (*Nebbia* v. *New York*, *supra*).

In dealing with employer-employee relations, the Legislature necessarily possesses a broad field of discretion in order that adequate protection of health and safety be maintained and that peace and order be promoted through laws designed to guarantee sound and wholesome conditions of work (*Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549 [1911]; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 [1937]).

The appellant's suggestion (Jurisdictional Statement, pp. 10, 11) that under the circumstances of the case at bar it has been singled out for liability to which other employers may not be exposed, is not material. Every classification of persons or things produces inequality in some degree but the law is not thereby rendered invalid unless the inequality produced be palpably unreasonable and arbitrary (*Arkansas Natural Gas Company* v. *Arkansas Railroad Commission*, 261 U. S. 379, 384 [1923]), nor are the provisions of a statute or the application thereof unconstitutional because it might seem that they inflict hard-

ship in a particular instance (*Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, 428 [1936]).

Despite the allegation of the appellant (Jurisdictional Statement, pp. 6, 11, 12), the reason why the case at bar was pending on July 1, 1957, the effective date of the amendment to Workmen's Compensation Law § 44-a (L. 1957, ch. 938), is not important. The significant fact is that the case was pending. However, as pointed out in the decision of the New York Supreme Court, Appellate Division, Third Department, there was nothing in the record on appeal to indicate that the appellant attempted to dispose of the case by perfecting the appeals which it had taken from the decisions of the Workmen's Compensation Board (fols. 177, 178). Under the circumstances, the appellant's complaint that the case was pending on the effective date of the amendment is not meritorious.

CONCLUSION

The jurisdictional statement of the appellant presents no substantial federal question to warrant a review by this Court of the order below. Hence, the appeal should be dismissed or the order affirmed.

Dated: New York, N. Y., November 28, 1960.

Respectfully submitted,

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APPENDIX A

Pertinent Statutes

§ 40. TIME LIMIT. Neither the employee nor his dependents shall be entitled to compensation for disability or death resulting from disease unless the disease is due to the nature of his employment and contracted therein, or in a continuous employment similar to the one in which he was engaged at the time of his disablement, within the twelve months previous to the date of disablement, whether under one or more employers. The time limit for contraction of the disease prescribed by this section shall not bar compensation in the case of an employee who contracted the disease in the same employment with the same employer by whom he was employed at the time of his disablement and who had continued in the same employment with the same employer from the time of contracting the disease up to the time of his disablement thereby; * * *

APPENDIX B

New York State Joint Legislative Committee on Industrial and Labor Conditions Report

SILICOSIS, LIABILITY, TIME LIMIT A. I. 3685, PR. 3827, SHERWIN CH. 938.

Workmen's Compensation Law, § 44-a.

In 1944, the Legislature passed Section 44-a of the Workmen's Compensation Law which extended the time to file for claims due to silicosis, as an occupational disease, from one year to two years after the last exposure. The intent of this section was to recognize that silicosis was, at least in some measure, a "slow starting disease" and that the disability resulting therefrom might become manifest within a period of two years, rather than one year, after the

employee was removed from the disease-causing environment.

Representatives of labor have informed the Committee that the two-year provision in section 44-a does not meet with the best interests of labor because silicosis is, in their opinion, so slow-starting that it may result in disablement long after the termination of such a limited period. It is labor's contention that the removal of an employee from a dust hazard area of employment to one of non-hazardous nature should not absolve an employer from responsibility for the onset of an active disease which results from conditions of earlier employment.

Up until December 23, 1955, labor generally believed that section 40 applied to silicosis as well as other slow-starting diseases. However, a decision of the Appellate Division in the matter of *Gajewski* ruled that the provision of continuous employment found in section 40 does not apply to silicosis and that, therefore, the "disablement" must occur within two years of the date of last exposure, and a claim filed thereon.

Because of this court decision, labor representatives urged that legislative action be taken to avoid a repetition of such conditions as were involved in the *Gajewski* case. Industry representatives, on the other hand, made equally strong pleas that there was no need for the modification of the occupational disease provisions of the Workmen's Compensation Law relating to silicosis because the conditions revolving around the *Gajewski* case were unusual and not normally duplicated.

The report of the Committee filed with the Legislature in 1956 (Leg. Doc. No. 55) made reference to the need for further exploration of silicosis and other related occupational diseases, including loss of hearing. It proposed to convene a summer conference during 1956 for the purpose of developing information which would lead to such con-

structive legislative actions as would achieve the mutual approval of interested parties. This conference was held in conformity with plans.

Agreement was reached, at least on a provisional basis, that an amendment to section 44-a be drafted for the purpose of protecting dust-affected employees beyond the two-year limit, while they are still in the employ of the company where the original exposure occurred and for a two-year period following the termination of employment with such company.

On the basis that this type of amendment would at least partially solve the phases of silicosis with which the Committee has been concerned, without undue effect on employers, the Committee has introduced this bill.

The amendment provides that where the employee remains continuously employed by the same employer and is transferred from an injurious exposure to a non-injurious exposure, he would be protected under the Workmen's Compensation Law for any period of time during which such employment with the same employer continues; and within two years of termination of such employment, over and above the other provisions now contained in section 44-a.

This measure will correct one phase of the silicosis and dust disease problem which has been in contention between industry and labor for the past two years.